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Supreme Court, U.S.
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In The
Supreme Court of the United States

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, UNITED TRANSPORTATION UNION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents ("Railroads") in their brief in opposition ("Opp.") fail to address the fundamental error in the Ninth Circuit's decision, i.e., the test in *Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3rd Cir. 1976) ("*Coleman*"), that an essentially local safety hazard should be defined as "one that is not capable of being adequately encompassed within uniform national standards," adopted by the Ninth Circuit, cannot be reconciled with the "considerable solicitude" afforded the states in *CSX Transp. v. Easterwood*, 507 U.S. 658, 665 (1993) ("*Easterwood*") and the exception to preemption twice provided the states in 45 U.S.C. § 434 (recodified as 49 U.S.C. § 20106).[1] The *Coleman* test excludes the states from identifying essentially local safety hazard sites and applying safety regulations even though the safety regulations are not incompatible with federal law, are necessary to reduce or eliminate those hazards, and do not create an undue burden on interstate commerce. 45 U.S.C. § 434.

Congress intended an exemption for the states at these special sites. Nothing in the statute would limit its application, as the Railroads argue, to industrial and plant railroads. Opp. at pp. 19-21. The argument is a transparent attempt to exempt the Railroads from the exception

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[1] *See Easterwood*, 507 U.S. at 665. ("The term 'covering' is in turn employed within a provision that displays *considerable solicitude* for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses [emphasis added].")

from federal preemption provided the states by Congress under 45 U.S.C. § 434.

Finally, the Railroads' contention that the improvements to the track and track structure at the Cantara Loop are not "necessary" for safe operations at this site is contradicted by both the statements of the site's prior owner, the Southern Pacific Transportation Company ("SP") (*see* Petition ("Pet.") at p. 4, note 7) and by the Union Pacific Railroad Company's ("UP's") expenditure of resources to provide special safety provisions at the site. Opp. at p. 10.

I. THE CPUC DID NOT MISCHARACTERIZE THE FACTS AT SITE 9 – THE CANTARA LOOP

Although the Railroads allege that the "'short-term effect[s]' of the Cantara Loop derailment and toxic spill (Opp. at p. 5) were 'devastating' . . . 'metam sodium is not a persistent chemical and the animal and plant life in the river began restoring itself within a matter of weeks.' R.E. 759,"[2] petitioners' ("the Commission's") staff provided evidence that,

> "[The] Sacramento River ecosystem will never recover from the 1991 spill. We've learned from our natural resource damage assessment that

[2] *Forward Through the 90's: Selected Issues in the Transportation by Rail of Hazardous Materials*, Federal Railroad Administration, September, 1994.

> some invertebrate species were completely extricated from the river six years ago including several species that were previously unknown to science."[3]

The Railroads assert that the Commission's "erroneous" but "exquisitely careful word choice" (Opp. at pp. 8-9) concerning accidents at Site 9 had as "its objective . . . to suggest a remarkable confluence of dangers at one spot," i.e., "32 derailments at 'this curve.'" Opp. at p. 9. The fact is that the Commission documented that 32 derailments out of the 90 that had occurred on this line, the Shasta Line, between 1976 and 1991, occurred at Site 9, a 10.5 stretch of track occurred at this Site (Pet. at B-40). In its petition, the Commission drew attention to the fact that the curve itself, the Cantara Loop, was only a small part of Site 9, a stretch of track less than one-half mile in length. Pet. at p. 7, note 16. Although the Railroads are correct in noting that the 32 derailments occurred at Site 9 and not at the curve itself, they completely ignore the fact that the curve is the cause of the cluster of derailments in its vicinity as the Commission's statistical analysis demonstrated.[4] The contention of the Railroads that there is nothing "extraordinary" about Site 9 is contradicted both by the number of derailments in the immediate vicinity and by the Commission's statistical analysis of the site and curve.

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[3] *Re Mitigation of Local Rail Safety Hazards Within California*, 75 CPUC 2d 1 at 18 (Sept. 3, 1997), 1997 CAL. PUC LEXIS 888 at *14-*15.

[4] *See Re Mitigation of Local Rail Safety Hazards Within California*, 75 CPUC 2d at 23-27, 1997 CAL. PUC LEXIS 888 at *35-*51.

II. SITE 9, THE CANTARA LOOP, IS AN ESSENTIALLY LOCAL SAFETY HAZARD BASED ON STATISTICAL AND OPERATIONAL ANALYSES

The Railroads contend that the Commission's statistical analysis "proved nothing about Site 9's derailment history" but, rather, "merely reflects the fact that Site 9 encompasses some of the most gradient terrain on the Shasta Line." Opp. at p. 23. To the contrary, the statistical analysis[5] of the derailment locations at Site 9 demonstrated that the accidents in the vicinity of the Cantara Loop were not random events[6] but were directly related to the conditions at the Cantara Loop. The 32 derailments caused by the track-train dynamics ("TTD") of the Cantara Loop by and large did not occur at the Loop itself but were, instead, clustered (Pet. B-30-31) within a 10.5 mile area around the Loop. The evidence established that the clustering of accidents near the Cantara Loop was no coincidence. Rather, this clustering was the direct product of the

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[5] "The CPUC began its process by using three independent, statistical methods (the Poisson, binomial, and multinomial models) to verify that accident concentrations at particular locations were not possibly random occurrences but could only be explained by site characteristics. Decision at 26-36. Plaintiffs have not disputed the validity of CPUC's statistical calculations in this proceeding. . . . If the causes did not indicate a particular local problem, the sites were dropped from consideration. Decision at 123-143; King Suppl. Decl. PP 65, 69. CPUC also identified those mountain grade sites in which extreme conditions forced the railroads to follow specially tailored, self-imposed operating restrictions. Decision at 36." *Union Pac. R.R. v. California PUC*, 109 F.Supp.2d 1186, 1201, Pet. at B-30.

[6] " 'Each statistical method confirms that the chance of the accident concentration at this site occurring randomly is extremely small at less than 1 in a trillion.' Decision at 127 (footnote omitted)." *Union Pac. R.R. v. California PUC*, 109 F.Supp.2d at 1206, Pet. at B-40.

extreme operational conditions and TTD forces imposed by the curve at the Cantara Loop. *See* note 4, supra.

In addition to the statistical analysis, the Commission applied an operational component in determining a local safety hazard site. "Staff assessed all main line track and identified sites where extreme operating characteristics forced the Railroad to impose unique operating restrictions."[7] With respect to the operational analysis and Site 9, the District Court stated,

> The Court would agree, however, that where substantial operational and/or equipment improvements have occurred at a particular site, evidence of recent improvements will certainly be relevant to the inquiry of whether the state rule is still "necessary" to reduce the local safety hazard at that particular site.

Union Pac. R.R. v. California PUC, 109 F.Supp.2d at 1202, note 16, Pet. at B-31-32.

Thus, the Commission has demonstrated both analytically and operationally through UP's own special rules and improvements for the site, that the Cantara Loop qualifies under 45 U.S.C. § 434 as an essentially local safety hazard.

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[7] *Re Mitigation of Local Rail Safety Hazards Within California*, 75 CPUC 2d at 27, 1997 CAL. PUC LEXIS 888 at *51.

III. IMPROVED TRACK AND TRACK STRUCTURE ARE ABSOLUTELY NECESSARY AT THE CANTARA LOOP

As noted in the petition, the federal track standards at the Cantara Loop with an approximate speed limit of 25 miles per hour, is the same as the track standards for a similar curve in the flats of any prairie state with a speed limit of 25 miles per hour. Pet. at p. 8. However, there are few sharp mainline railroad curves in flat areas; they are more prevalent on the switchbacks of steep, mountainous grade territory. Recognizing the sharp curves at the Cantara Loop, the SP had, and now the UP has, upgraded the track structure at the Cantara Loop well beyond these federal minimums. The TTD at this site, the sharpest curve on any mainline track in California on one of its steepest grades, are entirely different from any other location that does not have similar extreme characteristics. These extreme characteristics are limited in California to this one site, the Cantara Loop.

The Railroads' contention that SP's improvements cannot be "maintained and preserved" (Opp. at p. 10) because the track "was completely rebuilt by Union Pacific in the fall of 1997" (*ibid*) is disingenuous. The Railroads' support for this contention is R.E. 62. "The track at Site 9 was completely rebuilt by Union Pacific in the fall of 1997 when it installed the concrete ties and 133 # premium rail from milepost 322.6 to milepost 331.0." Compare this with SP's improvements:

> We undertook a program of changing out the curve-worn rail, to keep a better profile on the head of the rail in curves. Next, we . . . made a test installation of one-quarter mile of concrete ties on the main track at Small, to see whether

> concrete ties would eliminate spiking and hold-down problems which we had encountered with wooden ties. We tried a variety of clips and fasteners to improve the hold-down of the base of the rail to resist overturning. We also applied anti-roll blocks to the rail.

Re Mitigation of Local Rail Safety Hazards Within California, 75 CPUC 2d *supra* at 50, 1997 CAL. PUC LEXIS 888 at *137-*138.

Both the SP and the UP improved the rail, replaced wooden ties with concrete ties, added supports for the rail, etc. The UP effectively improved on SP's earlier upgrades. In *Re Mitigation of Local Rail Safety Hazards Within California*, *supra*, an SP witness testified that the measures that SP took "to strengthen the track structure, and to help the train engineers in their descending grade train handling, were successful in reducing, and virtually eliminating, the cluster of derailment problems suggested from the FRA statistics." *Ibid.* Consequently, there simply is no reasonable basis for suggesting that UP could not maintain and preserve these undeniably necessary improvements at the Cantara Loop.

IV. THE *COLEMAN* TEST CANNOT BE RECONCILED WITH THE "CONSIDERABLE SOLICITUDE" AFFORDED THE STATES IN *EASTERWOOD* AND THE EXCEPTION TO FEDERAL PREEMPTION TWICE PROVIDED THE STATES IN 45 U.S.C. SECTION 434

The Railroads argue that the "considerable solicitude" language in *Easterwood* "is simply a comment on the existence of those savings clauses, not a substantive interpretation of them." Opp. at p. 16. The Commission

disagrees. This Court has interpreted Congress' intent in 45 U.S.C. § 434 as clearly and unequivocally enunciating the rights of states to pass an additional or more stringent rail safety regulation at essentially local safety hazards so long as those safety regulations are not incompatible with federal law, are necessary to reduce or eliminate those hazards, and do not create an undue burden on interstate commerce. But as the District Court noted, the *Coleman* test, adopted by the Ninth Circuit here in *Union Pacific Railroad et al. v. California Public Utilities Commission et al.*, 346 F.3d 851 (9th Cir. June 17, 2003), 2003 U.S. App. LEXIS 11887, at p. *18-*19, cannot be reconciled with this Court's holding in *Easterwood* interpreting 45 U.S.C. § 434.

> The phrase "not capable of being adequately encompassed within uniform national standards" appears in the legislative history [citation omitted]. It is not clear to the Court, however, what this language meaningfully adds to the existing statutory requirements for a local safety hazard. Literally read, the term capable means possible, and it is *possible* to address almost any situation through a national regulation [citation omitted]. Thus, literally read, the language could eviscerate the exception. Given the Supreme Court's direction that the savings clauses deserve "considerable solicitude," it would be improper for this Court to inject an additional requirement that would largely if not completely undermine the local hazard exception. Thus, the only reasonable interpretation is that Congress was referring to commonly recurring situations that would most naturally be subject to national, uniform regulation. Such a requirement, however, adds nothing to the existing statutory requirements which clearly preclude

> regulation of commonly recurring situations that are "statewide" in character [citation omitted].

Union Pac. R.R. v. California PUC, 109 F.Supp.2d at 1204, n.19; Pet. B-35.

Therefore, the *Coleman* test, predating *Easterwood*, should be rejected by this Court and the District Court's reasoning, finding the Cantara Loop to be an essentially local safety hazard, should be adopted instead.

CONCLUSION

The petition should be granted.

Dated: December 5, 2003

Respectfully submitted,

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